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High-Speed Rail: An Opportunity for Texas Eminent Domain Reform

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HIGH-SPEED RAIL: AN OPPORTUNITY FOR TEXAS EMINENT DOMAIN REFORM

By: Aaron Mitchell†

ABSTRACT

With the Texas Central's high-speed rail fast approaching in Texas, legislators have been presented with an opportunity to reform Texas' eminent domain laws. The controversial urban-versus-rural project has brought eminent domain policy to the limelight. The Texas Legislature can capitalize on lessons learned from the State's bout with the Trans-Pecos Pipeline by protecting condemnees and incentivizing good faith efforts by condemnors.

This Article proposes five possible reforms for eminent domain law in Texas. First, the Texas Legislature should protect condemnees by aligning their appraisal disclosure requirements with condemnors, who have no duties to disclose appraisals. Second, legislative changes would allow attorney's fees to be awarded to a condemnee when a condemnor's offer is significantly lower than the actual value of the property. Third, legislative changes would inform condemnees of exactly which pieces of land that condemnors have the power to take when condemnors make their offer. Fourth, this Article proposes sensible protections for Texas homesteads. Last, this Article explores legislative and judicial blocks that can be used by opponents of the rail.

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I. BACKGROUND

As the Texas Central Railway (“TCR”) moves closer to breaking ground on its 240-mile, high-speed rail project that is set to cut through the heart of Central Texas, eminent domain has become an even more contentious issue for rural Texans and their representatives.¹ Eminent domain is an especially painful thought for them because they will bear the cost and inconvenience of a project that is primarily intended to benefit those in cities.² For those living in and around Houston and Dallas, TCR aims to provide a safe, efficient, and quick mode of transportation between the two metropolitan areas.³ As it stands, the TCR likely could invoke the harsh doctrine of eminent domain.⁴ However, this note will record, among other proposed and possible pro-landowner legislative solutions, a statutory interpretation that courts could use to block the TCR’s eminent domain authority.

The TCR’s status as a private entity adds another level of controversy. The land at issue is mostly used for farming, and a train would present unique challenges for landowners. These landowners may have their land divided by a railroad, which would only allow landowners to cross in certain areas.⁵ This potential physical division of property has created more hostility for the project amongst landowners and distinguishes the project from other less invasive uses of eminent domain. For example, power lines do not divide property at ground level, and traditional railroads do not always require fencing on either side of the track like the TCR has proposed.⁶ The TCR has responded to this criticism by theorizing that the train could sit on pedestals, forty feet high in some areas, but has not committed to the

1. See Brandon Formby & Sanya Mansoor, *Opponents of Proposed Dallas-Houston Bullet Train Push Lawmakers to Kill it*, TEX. TRIB. (May 5, 2017), <https://www.texastribune.org/2017/05/05/high-speed-rail-bills-highlight-divide-over-controversial-project/> [https://perma.cc/P3G7-ZA2H].

2. See *id.*

3. *The Project*, TEX. CENT., <http://www.texascentral.com/project/> [https://perma.cc/5T6N-YV6E] (last visited Jan. 26, 2018).

4. Frances Tubb, *Full Speed Ahead: The Texas Central High-Speed Rail and the Sacrifice Required From Residents of Rural Texas*, 49 TEX. TECH L. REV. 547, 590 (2017).

5. See *The Project*, *supra* note 3.

6. See Formby & Mansoor, *supra* note 1.

idea, citing a pending environmental review.⁷ Additionally, legislators have attempted to mandate that the rail must be constructed on such pedestals.⁸

The heart of the eminent domain issue is a landowner's right to exclusively possess their land. Land is a uniquely finite resource that can have both real⁹ and sentimental¹⁰ value. This value is essentially infinite because the land, if protected and used properly, can provide value to a family for generations. Texas's public policy largely favors landowners, and the state recognizes families who have owned and operated a continuous agricultural operation for 100 years or more through its Family Land Heritage Program.¹¹ The program has recognized over 4,700 farms and ranches in 242 counties.¹² In general, 86% of Texas land is used for agricultural production, with 98.5% of agricultural operations being run by individuals or families.¹³ The uncertainty surrounding high-speed rail has already imposed burdens on some of these farms; even the prospect of the rail coming through property has already deterred some farmers from making improvements.¹⁴ Texas's recognition of historic rights of landowners has led the state to adopt policies that protect the right of landowners—rural and otherwise.

Condemnation is a process of setting apart or expropriating property for public use in the exercise of eminent domain.¹⁵ The use of condemnation is considered a "derogation of rights" in Texas because it forces landowners to accept a price for their land, whether or not they always agree to it.¹⁶ For this reason, the Texas Supreme Court has mandated that eminent domain laws should be construed strictly in favor of the landowner.¹⁷ This strict view of statutes applies regardless of whether eminent domain is being exercised by a government or a private entity.¹⁸

7. *See id.*

8. *Id.*

9. *The Scarcity of Land*, ECONOMIST (June 18, 2009), https://www.economist.com/blogs/freeexchange/2009/06/the_scarcity_of_land [<https://perma.cc/N2FW-4ZQH>].

10. *Some Factors That Influence The Value of Land*, FISHER STARK, <https://fisher-stark.com/some-factors-that-influence-the-value-of-land/> [<https://perma.cc/9M84-QF5J>] (last updated July 5, 2015).

11. *The Family Land Heritage Program*, TEX. DEP'T AGRIC., <http://www.texasagriculture.gov/NewsEvents/FamilyLandHeritage.aspx> [<https://perma.cc/HSX7-WDVU>] (last visited Jan. 26, 2018).

12. *Texas Agriculture Facts*, TEX. DEP'T AGRIC., <http://www.texasagriculture.gov/Portals/0/DigArticle/1930/Ag%20Week%20Fact%20Sheet%203%2013%2013.pdf> [<https://perma.cc/JMP9-H249>] (last visited Jan. 26, 2018).

13. *Id.*

14. Formby & Mansoor, *supra* note 1.

15. *Condemnation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

16. *Burch v. City of San Antonio*, 518 S.W. 2d 540, 545 (Tex. 1975).

17. *Id.*

18. *Id.*

While landowners are rightfully concerned with their compensation and rights during the eminent domain process, eminent domain is justified as a necessary tool for growth. Consider the government's use of eminent domain to construct airports,¹⁹ engage in conservation efforts,²⁰ or fight wars.²¹ Although the high-speed rail's economic impact and public benefit are uncertain, the TCR argues that the project will have "substantial and long-lasting positive impact[s]."²² The TCR cites jobs, tax revenue, economic development, and a reduction in traffic as public benefits stemming from the project.²³

Nevertheless, many have argued that the project is not economically feasible. For example, Texas Representative Cecil Bell Jr. thinks that the train will leave Texans "foot[ing] the bill" by bailing out the railroad once it fails.²⁴ His ideas may have significant merit. An independent study on a similar project in California found that the state had grossly underestimated operating costs.²⁵ Consequently, the study concluded that taxpayers may be left with paying billions more than the forecasted amount per year.²⁶ Thus, funding the rail is a legitimate concern for Texans. However, basic free-market principles suggest that a private company would not enter into a multi-billion-dollar investment just to fail. As TCR managing director of external affairs said in December 2018:

When you have a project that is not government-driven, you have the discipline of following the data. This project works because [it is] in the sweet spot of the too far to drive, too short to fly. [It has] a strong market.²⁷

In Texas' 85th Legislative Session, lawmakers addressed this concern with varying levels of support from the rest of the Legislature.

Others have argued that the technology is not innovative or novel enough, and that bigger and better opportunities are just beyond the horizon. In Elon Musk's 2013 paper, *Hyperloop Alpha*, Musk voiced significant displeasure with disappointment that California, the home of Silicon Valley and technological innovation, approved a train that is

19. See, e.g., *Cameron Dev. Co. v. United States*, 145 F.2d 209 (5th Cir. 1944).

20. See, e.g., *Gwathmey v. United States*, 215 F.2d 148 (5th Cir. 1954).

21. See, e.g., *Sharp v. United States*, 191 U.S. 341 (1903).

22. *Discover the Benefits*, TEX. CENT. RAILWAY, <http://www.texascentral.com/benefits/> [<https://perma.cc/V74L-GHCL>] (last visited Jan. 26, 2018).

23. *Id.*

24. *Texas High Speed Rail Facts and Information*, CECIL BELL, JR., <http://www.cilbelljr.com/hst/> [<https://perma.cc/G22X-CKQG>] (last visited Jan. 26, 2018).

25. Ralph Vartabedian, *Bullet Train Authority Underestimates Operating Costs, Study Says*, L.A. TIMES (Apr. 24, 2012), <http://articles.latimes.com/2012/apr/24/local/la-me-0423-bullet-subsidy-20120424> [<https://perma.cc/G6UZ-ZW4H>].

26. *Id.*

27. Matt Zdun, *Dallas-Houston Bullet Train Critics Want to Boost Texas Oversight of Eminent Domain Use*, TEX. TRIB. (Dec. 13, 2018, 12 AM), <https://www.texastribune.org/2018/12/13/dallas-houston-bullet-train-critics-want-texas-oversee-eminent-domain/> [<https://perma.cc/5ZDB-TR5P>].

“one of the most expensive per mile and one of the slowest in the world.”²⁸ In lieu of high-speed rail, Musk proposed the Hyperloop: a near-vacuum sealed tube with a pod travelling almost 700 miles per hour that can span thousands of miles.²⁹ With this technology, Musk proposed a New York-Washington D.C. Hyperloop that will transport passengers between the two cities in twenty-nine minutes.³⁰ Musk plans to build the Hyperloop by contracting with the Boring Company—a company that builds massive tunnels for roadways, rails, and Hyperloops.³¹ Although his 2013 paper indicated that he was not interested in pursuing the initiative, Musk claimed that in 2017 he received “verbal [government approval] to build the New York-D.C. Hyperloop.”³² Later, officials disputed this claim.³³

This issue has divided Texas by pitting rural residents against those in larger cities. At the heart of the issue, for opponents of the railroad project, is eminent domain. This Article will focus on sensible, non-controversial reforms that both rural and urban citizens should agree on. These reforms include the following: (1) due process protections for landowners before condemnation proceedings; (2) attorney’s fees for plaintiffs who are offered an unreasonably low dollar amount for their land; and (3) specific requirements for companies making offers to purchase land that are designed to prevent landowners from unwittingly selling more land than required under Texas law. Additionally, this Article will outline legislative and judicial tools individuals seeking to block the train outright, although these measures are unlikely to succeed.

Importantly, if Texas adopts these eminent domain reforms, the benefit will not only extend to those affected by the TCR project; the proposals will affect all projects that involve eminent domain. Texas’s hesitancy regarding the TCR project is reminiscent of Texas’s previous tussle with the now complete Trans-Pecos Pipeline.³⁴ As with the high-speed rail, the Trans-Pecos Pipeline was resisted by communities that

28. *Hyperloop Alpha*, SPACE X 1 (2013), https://www.spacex.com/sites/spacex/files/hyperloop_alpha-20130812.pdf [<https://perma.cc/SQ89-EY8V>] (last visited Feb. 4, 2019).

29. *Id.* at 3

30. Correct citation: Danielle Muoio, *Everything we know about Elon Musk’s ambitious Hyperloop plan*, BUS. INSIDER (Aug. 17, 2017, 9:51 AM), <http://www.businessinsider.com/elon-musk-hyperloop-plan-boring-company-2017-8>.

31. *Id.*

32. Dominic Rushe, *Elon Musk Unveils Plans for Hyperloop Transport System*, GUARDIAN (Aug. 13, 2013, 5:09 AM), <https://www.theguardian.com/technology/2013/aug/12/elon-musk-unveils-hyperloop-transport> [<https://perma.cc/GS6J-HLCY>]; Julia Carrie Wong & Sam Levin, *Elon Musk: I Got ‘Government Approval’ for New York-DC Hyperloop. Officials: No He Didn’t*, GUARDIAN (July 20, 2017, 4:07 PM), <https://www.theguardian.com/technology/2017/jul/20/elon-musk-hyperloop-verbal-government-approval> [<https://perma.cc/A754-6GJV>].

33. Wong & Levin, *supra* note 32.

34. See David Hunn, *With Trans-Pecos Pipeline Done, Protests Dwindle*, HOUSTON CHRON., <http://www.houstonchronicle.com/business/article/With-Trans-Pecos->

it affected by the pipeline.³⁵ Once the pipeline's construction began, landowners received unfair treatment throughout the process; some condemnation proceedings found that landowners received offers from the state for their land that were thirty times less than offers from the condemning company.³⁶

If the Texas Legislature learns anything from the Trans-Pecos Pipeline, then the state should take appropriate steps to mitigate the damage caused by eminent domain. With high-speed rail coming down the line at breakneck speed, eminent domain reform is an important policy goal for rural Texans who are affected by the project. The reforms proposed below are intended to protect the interests of landowners during the proceedings but will not stop the TCR from the completion of the project. However, a full understanding of these reforms requires comprehension of Texas's eminent domain authority under the United States Constitution, self-imposed eminent domain limitations, and eminent domain condemnation proceedings.

II. A SURVEY OF EMINENT DOMAIN LAW

A. *Federal and Constitutional Law: Deference to the States*

Texas derives its eminent domain authority from the United States Constitution but limits its authority in the Texas Constitution by dismissing the newfound expansion of what constitutes a *public use* in *Kelo*, which is a United States Supreme Court case that allows takings for purely economic purposes.

1. United States Constitutional Authority

The Fifth Amendment of the United States Constitution is the basis for eminent domain takings; the provision gives owners the right to just compensation when their property is taken for a public use.³⁷ In *Kohl v. United States*, the United States Supreme Court concluded that the broad wording of the Fifth Amendment and the incorporation of the Bill of Rights by the Fourteenth Amendment grants the power to exercise eminent domain to the states.³⁸ Further, the Court determined that eminent domain authority "is essential to [the government's] independent existence and perpetuity."³⁹ In *Berman v. Parker*, the Court inferred that the term "public use" is synonymous

pipeline-done-protests-dwindle-11047601.php [https://perma.cc/9QC8-ZM8L] (last updated Apr. 4, 2017, 9:32 AM).

35. *Id.*

36. Naveena Sadasivam, *Big Bend Landowners Awarded Millions Over Pipeline, but the Fight Isn't Over Yet*, TEX. OBSERVER, (Jun. 14, 2016, 5:42 PM), <https://www.texasobserver.org/trans-pecos-eminent-domain/> [https://perma.cc/CP5E-ZGMC] (last visited Jan. 27, 2018).

37. U.S. CONST. amend. V.

38. *Kohl v. United States*, 91 U.S. 367, 372 (1875).

39. *Id.* at 371.

with the term “public purpose,” and that the government could exercise eminent domain authority in a program that transferred property from one private party to another in a redevelopment program in Washington D.C.⁴⁰ Importantly, *Berman* established that states should receive a high level of deference when deciding what constitutes a public use—a precedent that is still adhered to by courts.⁴¹

2. *Kelo* and the Expansion of “Public Use”

In *Kelo v City of New London*, the United States Supreme Court upheld a use of eminent domain that is the most far-reaching definition of *public use* to date. In that case, the City of New London attempted to exercise eminent domain by allowing a private pharmaceutical company to condemn properties for an “integrated development plan designed to revitalize its ailing economy.”⁴² The city justified the condemnations under a statute establishing that the taking of properties for an economic development project was both for *public use* and of interest to the public.⁴³ The Court justified its decision by citing the high deference given to state governments in deciding public use as established in *Berman*.

The dissenting justices in *Kelo*—O’Connor, Scalia, and Thomas—argued that the majority in *Kelo* “abandons [the] long-held, basic limitation on government power” that property should not be taken for the benefit of the taker.⁴⁴ In the view of these justices, all property in the United States is endangered by actors who pledge to improve lands taken or intended beneficial public use in ways that the state legislature approves.⁴⁵

3. The Texas Constitution—Dismissing *Kelo*

Article I, section 17(a) of the Texas Constitution allows for the takings of property (1) for public use, so long as it is incidental use, by the State, its political subdivision, the public at large, or an entity granted eminent domain authority by the State; and (2) to eliminate “urban blight on a particular parcel of property.”⁴⁶ The following provision, section 17(b), is the Texas Legislature’s reaction to *Kelo*. In 2009, Texas passed the Limitations on Use of Eminent Domain Act, which called for a referendum that would forbid using eminent domain for purely economic purposes or to enhance tax revenue.⁴⁷ Then later

40. 348 U.S. 26 (1954).

41. *See id.*

42. *Kelo v. City of New London*, 545 U.S. 469 (2005).

43. *Id.* at 476.

44. *Id.* at 494 (O’Connor, J., dissenting).

45. *Id.*

46. TEX. CONST. art 1, § 17(a).

47. Montana J. Ware, *Private Takings in Texas: Defining “Public Use” After Kelo*, 12 TEX. J. OIL, GAS & ENERGY L. 259, 264 (2017).

that year, Texas voters approved the constitutional amendment. This amendment effectively changed the Texas Constitution so that the legislature cannot expand statutory authority under the new rule in *Kelo*. Thus, eminent domain in Texas can only be exercised for a public use other than mere economic development. Accordingly, the controversial *Kelo* decision has no actual effect on Texas law.

B. *Texas Law: A Narrower Approach*

Texas has several statutory provisions relevant to the use of eminent domain by the TCR.⁴⁸ First, Texas railroads have statutory eminent domain authority. Second, Texas outlines the procedures and duties that condemnors must follow during eminent domain proceedings.

1. Railroads' Statutory Authority

Section 112.002(b) of the Texas Transportation Code grants Texas railroad companies the right to exercise eminent domain and to purchase, hold, and use all property as necessary for the construction of railways, stations, and other accommodations.⁴⁹ Railroads must demonstrate that the land is required for the construction of a right-of-way, depot, station building, or any other purchase necessary for the operation of a railroad; provided that the condemned property is located within two miles of the company's right-of-way.⁵⁰ If the condemned property is no longer needed for railway use, then the railway company has the right to convey property freely.⁵¹ Agents of a railroad have the right to enter a landowner's property exclusively to select the most efficient route for the railway, but may not enter the land in order to condemn the property or for any other purpose.⁵²

Land condemned by a railroad company is not held as a fee simple estate; the condemnation and taking of the land only grants the railroad a right-of-way easement in gross.⁵³ Once this easement is acquired, the railroad has the exclusive right to use the surface land.⁵⁴ Additionally, any land condemned by a railroad may be used only for purposes of the railroad.⁵⁵ Although a landowner may own the fee simple subservient estate that a railroad company has obtained a right-of-way on, the statutes prohibit a landowner from exercising mineral rights.⁵⁶

48. In this writing sample, only two of the provisions are covered.

49. TEX. TRANSP. CODE § 112.002(b)(5), (6) (West 2009).

50. *Id.* § 112.053.

51. *Id.* § 112.002(b)(6).

52. *Id.* § 112.051.

53. *Id.* § 112.055.

54. *State v. Beeson*, 232 S.W.3d 265, 277 (Tex. App.—Eastland 2007 pet. dism'd).

55. *Calcasieu Lumber Co. v. Harris*, 13 S.W. 453, 454 (Tex. 1890).

56. *Brightwell v. International-Great Northern R. Co.*, 49 S.W.2d 437, 440 (Tex. 1932).

After a piece of land is condemned for a right-of-way, a condemnor may fence off the right of way.⁵⁷ Landowners may acquire easements across a fenced right-of-way by prescription⁵⁸ or by necessity.⁵⁹ Further, landowners may be awarded damages if the railroad's right-of-way interferes with the landowner's access to property.⁶⁰ Other damages caused to a landowner's property by the use of the right-of-way may also be assessed as damages.⁶¹ However, courts have held that the operation of a railroad on one's property is not a nuisance.⁶²

Texas does not allow attorney's fees in eminent domain proceedings.⁶³ In Texas, attorney's fees can only be awarded if expressly authorized by contract or statute.⁶⁴ In *City of San Antonio v. El Dorado Amusement Co.*, the Court refused to award attorney's fees to El Dorado in a condemnation proceeding because Article 1, section 17 of the Texas Constitution was silent on the matter.⁶⁵ Therefore, the Legislature must amend the constitution or statutes in order to award attorney's fees in condemnation proceedings.

2. The Bona Fide, Good Faith Offer and Condemnation Proceedings

Eminent domain proceedings begin with the condemnor offering to buy or lease the landowner's property, delivered via certified mail.⁶⁶ In addition to an offer, the condemnor must send all land appraisals spanning the previous ten years.⁶⁷ No later than seven days after this initial delivery, the condemnor must mail a landowner's bill of rights statement to the landowner, pursuant to section 402.031 of the Texas Government Code.⁶⁸ The Texas landowner's bill of rights notifies landowners that they have the right to: (1) a notice of proposed acquisition of the owner's property; (2) a bona fide good faith effort by the entity proposing to acquire the property; (3) an assessment of damages to the owner that will result from the taking of the property; (4) a hearing under Chapter 21 of the Texas Property Code, including a

57. See *Craig v. Ft. Worth & D.C. Ry. Co.*, 185 S.W. 944 (Tex. Civ. App.—Fort Worth 1916, writ ref'd).

58. *Phillips v. Texas & P. Ry. Co.*, 296 S.W. 877, 880 (Tex. Comm'n App. 1927).

59. *Missouri-Kansas-Texas Ry. Co. of Texas v. Cunningham*, 273 S.W. 697 (Tex. Civ. App.—Amarillo 1925, no writ).

60. See *Gulf, C. & S.F. Ry. Co. v. Koch*, 144 S.W. 1035 (Tex. Civ. App.—Austin 1912, no writ).

61. See *Kendall v. Chicago, R.I. & G. Ry. Co.*, 95 S.W. 757 (Tex. Civ. App.—Dallas 1906, no writ).

62. See *Rainey v. Red River, T. & S. Ry. Co.*, 89 S.W. 768 (Tex. 1905).

63. *City of San Antonio v. El Dorado Amusement Co.*, 195 S.W.3d 238, 249 (Tex. App.—San Antonio 2006, pet. denied).

64. *Id.*; see also *New Amsterdam Cas. Co. v. Tex. Indus. Inc.*, 414 S.W.2d 914, 915, (Tex. 1967).

65. *City of San Antonio*, 195 S.W.3d at 249.

66. TEX. PROP. CODE ANN. § 21.0111(a) (West 2013).

67. *Id.*

68. *Id.* § 21.0112(a) (West 2017).

hearing to assess damages; and (5) an appeal of a judgement in a condemnation proceeding, including an appeal on the assessment of damages.

Next, the condemnor must engage in a bona fide good faith offer and attempt to reach an agreement with the landowner.⁶⁹ The condemnor may file a condemnation petition if no agreement is reached. The condemnor must provide the petition to the landowner via certified mail.⁷⁰ The condemnor must file the petition in the county in which the landowner resides, so long as the landowner resides in a county where at least part of the property is located.⁷¹ If this is not the case, then the condemnor may file the petition in any county where part of the land is located.⁷² After such filing, the judge of the court appoints three special commissioners to assess damages of the property being condemned.⁷³ Each party then has the opportunity to strike one of the special commissioners, in which case the judge will appoint a new commissioner.⁷⁴ Within twenty days, the special commissioners must schedule a hearing as near to the property as is practical or at the county seat.⁷⁵

The landowner must provide any appraisals used to establish the owner's opinion of value to the condemnor the earlier of ten days after the appraisal or three days before the hearing date.⁷⁶ However, the statute does not require the condemnor to disclose any such appraisals except for the appraisals originally sent to the landowner with the bona fide good faith offer.⁷⁷

III. TEXAS' OPTIONS TO PROTECT LANDOWNERS ON THE EVE OF HIGH-SPEED RAIL

A. *The Legislative Options*

1. Eminent Domain Proceedings

a. *Due Notice: Establishing a More Level Playing Field*

Landowners and the TCR will likely never be on an equal playing field—as a large company, the TCR will almost always have more funds and access to legal expertise than the average condemnee. To level this playing field, the legislature should err on the side of helping landowners, in the same way that Texas courts construe statutes in favor of landowners.

69. *Id.* § 21.0113 (West 2017).

70. *Id.* § 21.012 (West 2017).

71. *Id.* § 21.013(a) (West 2017).

72. *Id.*

73. *Id.* § 21.014(a) (West 2017).

74. *Id.*

75. *Id.* § 21.015(a) (West 2013).

76. *Id.* § 21.0111(b) (West 2013).

77. *Id.* § 21.0111(d).

The Texas Legislature should consider revamping the condemnation proceedings process. The Texas Property Code requires landowners to disclose their appraisals either ten days after receiving the appraisal or three days before the condemnation proceeding, whichever comes first.⁷⁸ The condemnor, however, is not subject to any such requirements. Because condemnors have no requirement to disclose appraisals prior to hearings, landowners are forced to analyze condemning appraisals during hearings. It is effectively a “trial by ambush.”

This proposal is perhaps the most important one proposed in this Article because justice requires that condemnees and condemnors are treated equally during the proceedings. The current law is inconsistent with the state’s public policy that greatly favors landowners. Allowing condemnors to withhold appraisal documents until the commissioner’s court hearings gives condemnors a distinct advantage—establishing their preferred price in the proceedings. With at least three extra days to analyze the condemnee’s appraisals, the condemnor has a clear advantage with more time to identify weaknesses in the condemnee’s appraisal, discredit the condemnee’s appraiser, and even counter the condemnee’s appraisal with additional appraisals. Meanwhile, the condemnee is significantly disadvantaged by being forced to analyze the condemnor’s appraisal during the hearing.

Texas can look to states like New Jersey for guidance where both parties are required to disclose the results of their survey fifteen days before the condemnation proceedings.⁷⁹ Other states, such as New Mexico, do not require either of the parties to disclose their appraisals prior to the hearing.⁸⁰ Although, New Mexico’s policy is not ideal because parties must hastily analyze each other’s appraisals; nevertheless, it puts both the condemnor and condemnee on equal ground and is thus more fair than Texas’s policy.

b. Attorney’s Fees: The 120% Rule

The Legislature should also consider requiring condemnors to pay a condemnee’s attorney’s fees when the land value is 120% of the condemnor’s offer. This policy incites condemnors to responsibly use their authority. The benefit of attorney’s fees extends beyond landowners that contest a condemnation; the policy will also mean that those who accept the condemnor’s offer will likely receive a fair offer

78. *Id.*

79. Ashley, et al., *Law and Policy Resource Guide: A Survey of Eminent Domain Law in Texas and the Nation*, TEX. A&M U. SCH. L. 19 (2015), <https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1003&context=nrs-publications> [<https://perma.cc/8526-BJHR>].

80. *Id.*; see also N.M. STAT. ANN. § 42A-1-5(A)(3) (LexisNexis 1978 & Repl. Supp. 1994).

and avoiding the risk of losing attorney's fees in litigation subsequent to an undervalued offer.

Without this reform, condemnees who reject the condemnor's offer and hire attorneys will not recover the full value of their land. As the Trans-Pecos Pipeline exemplified, condemnees were offered amounts that are one-thirtieth of the land's actual value. In such cases, the condemnee cannot recover the full price of his land—the condemnee can only recover the price awarded, less the attorney's fees.

In deciding whether to accept the condemnor's offer, the condemnee engages in game theory. On one hand, the condemnee can take the condemnor's offer and give up the opportunity to contest the value of his land. Alternatively, the condemnee can reject the offer and contest the value of the land. In the second option, the landowner must also factor in the cost of attorney's fees—if the land value increases by an amount that is less than the attorney's fees, the landowner will have effectively lost. In order to tactfully incite condemnors to offer amounts closer to the land's actual value and to protect the condemnee, the legislature should consider awarding attorney's fees when the condemnor's offer is lower than the actual value by 20% or, another appropriate percentage.

Seventeen other states have statutes that awards attorney's fees when offers are lower than the actual value of the property. Of these states, five award attorney's fees when the actual value is 110% of the offer, two do so for 115%, two others for 120%, and one for 130%.⁸¹ Meanwhile, six states award attorney's fees if the land's actual value is above the offer by any amount, and one state awards attorney's fees if the actual value is closer to the landowner's attested value than the condemnor's attested value.⁸²

Opponents of this proposal may argue that awarding attorney's fees would create a plaintiff market and cause excessive litigation. The Texas government took similar steps to stop plaintiff-lawyer markets with both the legislative and judicial tort reform actions from 2003–2005.⁸³ The Legislature capped several medical malpractice and personal injury claims to discourage plaintiffs' lawyers from pursuing hefty verdicts needed to support their practice.⁸⁴ Meanwhile, the Texas Supreme Court took similar tort reform in several judicial rulings.⁸⁵

However, the market for eminent domain lawyers is distinct from that of medical malpractice and tort lawyers. In eminent domain proceedings, the condemned land's value is a solely economic question—the proceedings exist to establish its value. Meanwhile, one of Texas's

81. Ashley et al., *supra* note 78, at 11.

82. *Id.*

83. David A. Anderson, *Judicial Tort Reform in Texas*, 26 REV. LITIG. 1, 4 (2007).

84. *Id.* at 16–17.

85. *Id.* at 5–13.

key tort reforms was the limitation of non-economic damages, such as pain and suffering.⁸⁶ Eminent domain proceedings are worthy of adjudication because the land's value is inherently economic in nature. Without this adjudication, the disfavored operation of law may economically harm the condemnee.

Additionally, the benefits that awarding attorney's fees will bring to condemnees justifies the cost of encouraging adjudication. In fact, condemnation proceedings are a relatively simple proceeding compared to personal injury and malpractice claims. These claims are typically full-blown lawsuits; which require discovery, sometimes lengthy trials, expensive expert witnesses, and more court time and expenses. Texas's tort reforms were actually aimed at ending the litigious gamesmanship that occurred in these lawsuits.⁸⁷ Condemnations, on the other hand, are relatively simple hearings that mainly surround one question: the value of the land. Additionally, condemnations are inherently less common than personal injury cases—while more than forty Texans are seriously injured on roads each day, there are significantly fewer properties condemned per day.⁸⁸

Finally, the inherent disadvantage *vis-a-vis* legal expertise and financial flexibility that condemnees have when facing condemnors is the exact opposite of personal injury and malpractice claims. In condemnation proceedings, the party defending its land is typically disadvantaged because the condemnor is a large entity that performs many condemnations and has significant financial resources. Conversely, in tort claims (and especially medical malpractice) claims, the party defending itself is an insurance company that is experienced in defending these types of suits; while the plaintiff has no experience in this area. Unlike tort reform, Texas does not have to overlook the interests of the inherently disadvantaged parties in eminent domain reform, but instead should help condemnees because they are less likely to have less legal expertise and financial flexibility.

Awarding attorney's fees in eminent domain proceedings will benefit rural Texans and help level the already uneven playing field in Texas eminent domain proceedings by encouraging true good faith offers by condemnors.

86. Joseph Nixon & Texas Public Policy Foundation, *Ten Years of Tort Reform in Texas: A Review*, HERITAGE FOUND. (July 26, 2013), <https://www.heritage.org/report/ten-years-tort-reform-texas-review> [https://perma.cc/3AF7-V72S].

87. *Id.*

88. *Texas Motor Vehicle Traffic Crash Facts Calendar Year 2017*, TEX. DEP'T TRANSP., https://ftp.dot.state.tx.us/pub/txdot-info/trf/crash_statistics/2017/01.pdf [https://perma.cc/4KX3-XUMB] (last updated Apr. 20, 2018).

*c. Tricking the Landowner: Establishing Honesty
in the “Good Faith” Offer*

The Texas Legislature must address another important issue for rural Texan condemnees: uninformed condemnees accepting offers without a proper understanding of the situation. Texas already has several requirements for the offer stage of the taking, but none require the condemnor to specify which parts of the land the condemnor has actual authority to take. If the condemnee falsely thinks the condemnor has authority to take more land than authorized, the condemnee can be tricked into selling more land than if the condemnee were better informed.

Texas should adopt a policy wherein condemnors must send two offers to landowners: one for all land that the condemnor has the authority to take and a separate one for any land that the condemnor does not have authority to take. Additionally, each offer should be labeled as such. Giving landowners this protection will be similar to Texas’s policies requiring condemnors to notify condemnees of their rights before the proceedings occur. This could afford more knowledge to condemnees and allows them to make informed decisions about their rights in the condemnation process.

This policy is based on the layman-condemnee’s lack of understanding of the overall process, compared to the condemnor, who has likely taken many other properties for the project. This power imbalance, combined with the condemnor’s presumably superior financial situation, significantly disadvantages the condemnee. Texas should ensure that they have access to information regarding which pieces of land the condemnee is and is not required to give up.

Perhaps this will slow down the condemnation process and lead to increased litigation, but the policy need only require a small amount of additional information in a packet sent to the condemnee and will likely have no effect on condemnation proceedings.

2. Texas Homesteads: A Sensible Expansion
of Homestead Protection

In the 85th Legislative Session, Senate Bill 243 (referred to but never voted out from the State Affairs Committee) sought to protect landowners from private entities exercising eminent domain authority over homesteads and all adjacent property owned by the same owner.⁸⁹ The tax code defines a residence homestead as a structure, and up to twenty acres of land, that is owned through beneficial interest in a trust, built for and used as a human residence, and is the individual’s principal residence.⁹⁰ The bill would have enabled landowners threatened with condemnation to file a petition to dismiss the con-

89. Tex. S.B. 243, 85th Leg., R.S. (2017).

90. TEX. TAX CODE § 11.13(j) (West 2013 & Supp. 2018).

demnation action, which would then approved by a majority of the special commissioners.⁹¹ After approval, the condemnation action would be dismissed.⁹² Of note, this bill would give license to, but not require, the special commissioners to dismiss the condemnation action.

While the bill aims to protect Texas homesteads, the policy contained therein may make it unlikely that a high-speed rail could be constructed in Texas. The bill would allow any private entity's eminent domain authority to be blocked by a quasi-jury of three judge-appointed real property owners (*i.e.*, the Texas special commissioners). Specifically, the problem is that the homestead, together with any adjacent land owned by the same owner, could stretch for miles, instead of being limited to the twenty acres contained in the homestead. However, Texas has repeatedly shown favor towards family-owned property used for residential purposes and for this reason, the Legislature should not abandon homestead protections against eminent domain.

Accordingly, this bill should be rewritten to dismiss of a private entity's condemnation proceeding only when the adjudicated land is a homestead. First, such a rule would allow private entities to continue exercising eminent domain authority without the possibility of rogue special commissioner's courts in certain counties blocking their project entirely. If the Legislature wants to block the high-speed rail, it should do so directly, and not in a roundabout way. Second, allowing special commissioner's courts to selectively protect areas of no more than twenty acres is a very reasonable approach because dismissing those plots of land that are no more than twenty acres will happen infrequently and are unlikely to affect the high-speed rail's overall feasibility. In short, this policy would be extremely beneficial for landowners and have a negligible effect on condemners.

3. Pulling the Brakes: An Outright Block of High-Speed Rail

Federal courts granted Texas the absolute authority to block the high-speed rail's eminent domain authority. However, some laws proposed in the Legislature would subtly block the high-speed rail without the public's knowledge. The Legislature has a duty to be open in the legislative process. Therefore, it should weigh the pros and cons of stopping the high-speed rail in a clear and transparent manner.

For this reason, the most honest way to revoke the TCR's eminent domain authority requires amending Texas Transportation Code section 112 to specifically state that any high-speed rail company intended to operate rail services with speeds greater than 120 miles per hour is not considered a railroad company.⁹³ This would effectively

91. Tex. S.B. 243, 85th Leg., R.S. (2017).

92. *Id.*

93. Tex. H.B. 2161, 85th Leg., R.S. (2017).

strip the TCR of its apparent eminent domain authority and completely block the project in a direct, transparent, and non-disguised way.

Whether the legislature should block the high-speed rail is a question better answered in a more policy-focused article.

B. *The Judicial Derail*

Some in Texas have argued, however, that the TCR is not a railway at all because the TCR lacks any rail cars, rail lines, or passengers.⁹⁴ If the TCR is not a railroad under Texas law, the project is likely dead in its tracks.⁹⁵ The Texas Transportation Code defines *railroad* as any railroad incorporated before September 1, 2007—which the TCR was not—or “any other legal entity operating a railroad. . . .”⁹⁶ Legislative history gives no apparent insight as to what the Texas Legislature intended by the word *operating*.

This ambiguity, combined with the Texas courts’ longstanding tradition to construe statutes in favor of the landowner, may result in the courts adopting an approach that the state can eminent domain authority to corporations operating a physical railroad. Some lawmakers are pushing for this ruling, but it is unlikely for three reasons.

First, a ruling that the TCR is not a railroad would be absurd and thus likely outside the statute’s plain meaning. The Texas Supreme Court will find a statute’s intent through its plain meaning.⁹⁷ Such a statute will not be construed according to the plain meaning, however, if the result of that plain meaning is absurd.⁹⁸ The petitioner’s argument—that the TCR is not a railroad because it does not operate a railroad—can be easily be countered by the absurd outcome. If this was indeed what the legislature intended, then the TCR could become a railroad by building a small track and operating a train on it. Such a track, under the petitioner’s argument, could feasibly be as little as 100 feet long. The TCR’s argument is that it would be absurd to conclude that the legislature intended for every prospective railroad to create a small track to *operate* on to gain eminent domain authority.

Second, this argument is also unlikely to be the true legislative intent because it imposes undue financial burdens and obstacles on startup railroad companies. No reasonable interpretation would force each company to create a semi-useless railroad before it can gain the rights and privileges of being a true railroad.

94. Brandon Formby, “*Come and Take it*”: *Eminent Domain Dispute at Heart of Bullet Train Battles*, TEX. TRIB. (Feb. 23, 2017, 12:00 AM), <https://www.texastribune.org/2017/02/23/come-and-take-it-eminant-domain-dispute-heart-train-battles/> [https://perma.cc/V7NU-H5AR].

95. *Id.*

96. TEX. TRANSP. CODE § 81.002 (West 2009 & Supp. 2018).

97. McIntyre v. Ramirez, 109 S.W.3d 741, 747 (Tex. 2003).

98. City of Rockwall v. Hughes, 246 S.W.3d 621, 625–26 (Tex. 2008).

Third, the TCR's argument,⁹⁹ that it is operating a railroad under the statute because it has many employees and operates an entire corporation with the purpose of constructing and operating a railroad aligns within a statute's plain meaning. This supports the argument because subsection (1) of the relevant provision indicates that railroads are a type of company—not a physical railroad—by its language “a railroad incorporated. . . .” Railroads cannot be incorporated; only railroad companies can be incorporated. Thus, the TCR will argue that the likely meaning of subsection (2) is that eminent domain power is granted to corporations that have a railroad operation in some capacity of their business, whether that operation is a physical or through the planning phases of a railroad.

The judicial solution that opponents of the rail may bring against the TCR is unlikely to occur. However, strong judicial activism may aid petitioners in their bout to end the TCR's project. Texas's elected judiciary gives this a better chance, but in all, the project is unlikely to be blocked through the judiciary.

IV. CONCLUSION

As Texas grapples with a potential high-speed railway, the state has a tremendous opportunity to reform its eminent domain policies. The state's courts have recognized the harsh nature of eminent domain, and the electorate of Texas has approved a constitutional amendment that restricted the use of eminent domain by nullifying *Kelo* in favor of the landowners. Now, the legislature can make significant strides in protecting the rights of individual landowners throughout eminent domain proceedings.

First, the Legislature should consider putting the condemnor and condemnee on a level playing field by aligning when each party must disclose its appraisals of the condemned land. Second, legislators should address whether attorney's fees should be awarded to condemnees if the condemnor's offer is twenty or more percent less than what the land is actually worth. Third, the Legislature should resolve whether condemnors may submit offers to condemnees that do not specify which areas of land that the condemnor has authority to condemn. Fourth, the twenty-acre Texas homesteads should be protected from eminent domain use. Fifth, if the Legislature wants to block the high-speed rail outright, as some legislators support, the legislator should do so in a straightforward way. Last, opponents of the rail have proposed judicial interpretations that would block the rail entirely, but these interpretations are unlikely to prevail.

99. Formby, *supra* note 93.

